Follow-Up Questions for Jeffrey S. Sutton
From Senator Patrick Leahy

Disability Rights and Civil Rights

1. During your hearing, you brought up your involvement in Ohio Civil Rights Comm'n. v. Case W. Reserve Univ., 666 N.E.2d 1376 (Ohio 1996), several times. In that case, you were the Ohio Solicitor General, in charge of all of the State of Ohio's appeals. In that capacity, you would usually have represented a state agency like the Ohio Civil Rights Commission, would you not?

   If you did in fact choose to represent the Ohio Civil Rights Commission, please explain to me the legal and policy reasons for your decision.

   I do not understand why the Attorney General had to agree to represent the State Universities as an *amicus* party on the other side of the Civil Rights Commission. Did you have any discretion to recommend that the Attorney General only weigh in on one side or other, and, if so, what did you recommend?

In this case both the Ohio Civil Rights Commission and the state medical schools were state agencies. Therefore, both were entitled to be represented by the State in the Ohio Supreme Court. As General Montgomery has indicated in a letter to the committee, I recommended that the State Solicitor argue the Commission's position in the case, because I believed that the Commission had the better factual, legal and equitable arguments in the case.

Once I was assigned to represent the Commission, I did not have discretion to recommend to the Attorney General that she not weigh in on the state medical schools' side of the case. That would not have been appropriate given my obligation to the Commission at that point in time. Whether to represent the state universities as an *amicus* in the Ohio Supreme Court was the Attorney General's decision.

2. From my count, you have only argued two cases that could be seen to be in favor of disabled individuals: (1) Ohio Civil Rights Comm'n. v. Case W. Reserve Univ., 666 N.E.2d 1376 (Ohio 1996), discussed above, and (2) National Coalition for Students with Disabilities v. Taft, 2002 U.S. Dist. LEXIS 22376 (S.D. Ohio 2002), in which you argued that the Ohio Secretary of State violated the National Voter Registration Act in failing to designate the disability services offices at state public colleges and universities as registration sites. In terms of your actual clients, are there any other cases involving disability rights that you argued, other than those noted above, in which you were involved before you were nominated to this position in May 2001? If so, please describe each case for me.

In *Roman v. Gobbo*, a case pending in the Ohio Supreme Court, I am representing a client that is arguing that a proposed interpretation of Ohio tort law

would violate the ADA and Ohio civil rights law. The brief in that case has been forwarded to the Senate Judiciary Committee. In addition, the Equal Justice Foundation, for which I am a board member, has filed numerous cases on behalf of disabled persons in Ohio. Some examples are: suing cities in Ohio to force them to make their sidewalks accessible to persons in wheelchairs, and suing an amusement park company that prohibited people with disabilities from using their rides.

3. At your hearing, you testified that a judge should try to "see the world through other people's eyes" (Transcript at p.102). In other words, you said that as an advocate you have tried, and as a judge you would try, to imagine what it would be like to be on each side of the cases that come before you. Let me ask you for a moment to engage in this exercise. Please imagine that you are Patricia Garrett, J. Daniel Kimel, Christy Brzonkala, a Westside Mother, or any other disabled person, senior citizen, woman, low-income child, or state employee. Please describe for me what you think it would be like to be in their shoes after those court decisions, in which you participated, denied these individuals remedies for their claims. What do you think are the implications of your arguments on these, and other similarly situated, individuals' ability to receive compensation when their rights are violated?

Having represented the cause of individuals in civil rights litigation and having lost, *see, e.g., Case Western*, I can well imagine what it would be like to be in the shoes of these litigants. For Cheryl Fischer, it was a great blow to her to learn that Case Western would not allow her to be the doctor and psychiatrist she had dreamed of becoming. And it was disappointing to me as well. Any long-term implications of the arguments in the above cases, I respectfully submit, should be attributed to the clients and deciding courts, not to the lawyer who argued the case.

It bears mentioning that the cases you cite are not necessarily the final word on the respective plaintiffs' ability to recover: one case was later reversed (*Westside Mothers*); one case continues with a pending claim under section 504 of the Rehabilitation Act (*Garrett*); one case permits the Congress to respond with Spending Clause legislation, if indeed it has not already done so (*Kimel*); and the final case not only allows state tort remedies but also would allow Congress to amend the statute to include a jurisdictional element (*Morrison*).

Federalism

4. In answer to one of my questions to you about your cases involving sovereign immunity issues, you stated that you have represented both sides of the issue. (Transcript pages 95-96). Please list and describe for me cases in which you have argued against a state in a case in which the state was claiming immunity from suit under the Eleventh Amendment.

My recollection is that, during the hearing, I stated that I would be willing to represent both states and private litigants in Eleventh Amendment cases. To

my knowledge, I have not been asked to argue, and have not argued, a case against a state that was asserting immunity under the Eleventh Amendment. However, I have argued against states on a number of occasions. *See, e.g., Becker v. Montgomery*, 532 U.S. 757 (2001); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001).

5. At your hearing, you said that you "believe in Federalism as a principle" but that the disagreement concerns "the application of that principle in given cases." (Transcript at p.161). In your view, how should that principle be applied and what factors would guide your application?

Supreme Court precedent marks the appropriate path for applying this principle. That precedent establishes that federal legislation is given a heavy presumption of constitutionality, *United States v. Morrison*, 529 U.S. 598, 607 (2000), and that Congress is better equipped than the courts to ascertain as a matter of fact finding whether an issue deserves national or local resolution. *See City of Boerne v. Flores*, 521 U.S. 507, 517 (1997). Within that framework, the Supreme Court has held that it still retains authority under *Marbury v. Madison*, 1 Cranch 137, 176 (1803), to determine what state and national laws are constitutional. *See City of Boerne*, 521 U.S. at 535-36. I would faithfully adhere to these decisions.

6. In your remarks at a Federalist Society panel entitled "Federalism Revived? The Printz and City of Boerne Decisions," you said: "In a federalism case, there is invariably a battle between the states and the federal government over a legislative prerogative. The result is a zero-sum game—in which one, or the other law-making power must fall." You further state that: "It strikes me that states and localities don't deserve any more victories at the Court if they can't develop a little more courage when it comes to litigating these structural issues. It is frustrating that, in pursuit of particular political goals, the states are not rising up together and defending their authority against encroachment by Congress."

   Do you recall making these statements about your personal views of the zero-sum game of federalism?

   Is it still your view that federalism cases are "invariably" a battle between states and the federal government? Is it your view that the states and the federal government are necessarily locked in an antagonistic battle for supremacy and that the federal government is always the usurper of state prerogatives? Do you still believe that states need to develop a "little more courage" in challenging federal power before the Supreme Court?

I do not specifically recall these remarks, which occurred during a panel discussion that I was moderating. I would say, however, that in the context of Section 5 legislation, the Supreme Court has made the same comment. According to the Court, certain statutes passed by Congress were "grounded on the expansion of Congress' powers with the corresponding diminution of state sovereignty . . . ."

***Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976). Thus, the Supreme Court itself has characterized some federalism cases—those, like *City of Boerne*, in which the federal government and the states cannot simultaneously regulate the same subject matter—as a zero-sum game because one sovereign's gain of power necessarily causes the other sovereign to lose authority in that area. But this is not invariably true in all federalism cases; it is most likely true in section 5 cases, and less so in Commerce Clause cases. In the context of regulating commerce, states and the federal government have overlapping jurisdiction, and state and federal laws may in many instances supplement rather than supplant one another. And in the context of Spending Clause legislation, the Court has said that the states consent to be regulated in return for federal funds -- which would not seem to create a zero-sum situation.**

My comment about states' "courage" to litigate structural issues was made in the context of underscoring that federalism is about the structural allocation of power, and should not be a subterfuge for reaching one favored policy result over another. In any event, as to what the states should or should not litigate, the job of a court of appeals judge would be to resolve the case based on precedent, not based on the number of states involved in the litigation.

7. You also stated in a 1997 article titled, "City of Boerne v. Flores: A Victory for Federalism," that "federalism is ultimately a neutral principle" that says nothing about what particular policies should be adopted. Discussing your role as an advocate for overturning the Religious Freedom Restoration Act, you argue that: "In seeking to invalidate the federal RFRA, we stated that if RFRA is struck down, we will propose state legislation along the same lines the day the law is struck. And that's what we did. At the end of the day, we ought to have 51 different RFRAs." ("Federalism Revived? The Printz and City of Boerne Decisions.") Are there now 51 RFRAs? How is your view of federalism a "neutral principle" when it would strip away a floor of national protections that is already in place and create a patchwork quilt of different laws that are inevitably less effective? How would 51 different Clean Air Acts or 51 different food safety acts protect the environment and the public's health and welfare? Aren't some of these issues necessarily solved on a national level? Don't you think that some of these are battles in which both the state and the federal government, along with American citizens, may win?

I do not know the number of state RFRAs that have been passed. My comment about "neutrality" had to do with the allocation of policymaking power, not with the substance of a given policy. That is to say, federalism applies as a system of checks and balances between state and federal power regardless of whether one agrees with the federal policy at issue. One inevitable consequence of that system of checks and balances is some disuniformity. However, as I said at the hearing last week, some issues are more amenable than others to national resolution. While the Supreme Court has applied a broad presumption of constitutionality to all federal laws, it has been more skeptical of national family laws than, say,

national environmental laws. Environmental issues raise externality problems that do not arise in other contexts. Thus, as your question suggests, some policy issues do demand a national solution.

8. Mr. Sutton, at your hearing, you were asked about a comment that you made in a Legal Times article in November 1998, a time when you were still State Solicitor of Ohio. (Tony Mauro, "An Unlikely High Court Specialist," Legal Times, 11/2/98 at 8.) Specifically, you were quoted in the article as saying "It doesn't get me invited to cocktail parties. But I love these issues. I believe in this federalism stuff." When I asked you about this quote at your hearing, you explained it by saying that you were on the lookout for U.S. Supreme Court cases "**after** I left the State of Ohio" and go on to discuss the cases you took on when you returned in Jones Day. (Transcript at p. 92). However, when later asked about the same quote by Senator DeWine, you stated that at the time of the article you were State Solicitor and that you were on the lookout for cases because "Betty Montgomery, the Attorney General, correctly realized . . . that just because a case comes from another State, another set of courts, and goes to the U.S. Supreme Court, it doesn't mean it's not going to affect them. . . . What the article was pointing out and what Betty Montgomery asked me to do and we did do was to look for cases principally in her area of interest. Her area of interest was, of course, criminal law." Now that you have had an opportunity to compare these two responses, would you like to revise the answer you provided to me at your hearing?

   The article also indicates that you said Betty Montgomery was "very supportive" of your efforts to participate "early, often and orally in Supreme Court cases" that did not directly involve Ohio. Was she the one driving Ohio's involvement in Supreme Court cases, as you testified at your hearing, or were you the one, as you were quoted as saying in the article? The article quotes other sources as evidence of the fact that it was your "first-out-of-the-gate aggressiveness" and "active role" which led to Ohio taking so many cases before the Supreme Court, getting other states to sign onto the briefs, and to you getting argument time. What is the truth?

I misapprehended the above question, which I thought referred to periods both during and after I was State Solicitor. That said, it is certainly true that I was on the lookout for Supreme Court cases *after* I left the State Solicitor's office when I returned to Jones Day. And it is true that during that time I was hired to represent States, to represent parties against States, and to represent parties in cases not involving States.

With respect to the article and my time as State Solicitor, my answer to Senator DeWine's question is correct. I was State Solicitor when the article was written. And the Ohio Attorney General did realize that cases going to the Supreme Court from other States affected Ohio, and, accordingly, asked me to look for Supreme Court cases involving her area interest.

Finally, my job as State Solicitor was a subordinate one. I was hired by the Ohio Attorney General to serve her interests and the interests of the many state clients that she represented. Everything that I am described as doing in the article was done to further those interests and was done only with her permission.

9. In answer to questions about many of the cases on which you worked, you stated that you were just an advocate and that a client's position cannot be ascribed to the lawyer. Therefore, I would like to put the cases that you have argued aside and focus on your published writings. You indicate in your Senate Questionnaire that you have nine published writings and have given numerous speeches. It appears that the plurality of these writings have been in Federalist Society papers, particularly those of the practice group called Federalism & Separation of Powers, of which you were an officer. In all of those articles, you argue in favor of a certain ideology, one that seeks to increase state power and decrease the power of the federal government. As noted above, you have said that it is frustrating that "states are not rising up together and defending their authority against encroachment by Congress" and have argued passionately in favor of limits on Congress' authority to act under Section 5 of the Fourteenth Amendment and the Commerce Clause. Yet, at your hearing, when I asked you whether you prefer states' rights or national standards, you said that you "have no idea." (Transcript at p.96). Any reasonable person would take your views reiterated time and time again as deeply held, yet you seemed to disavow those views at your hearing. Are you saying that you do not believe anything that you voluntarily wrote in these articles for the Federalist Society?

In commenting on some of the federalism decisions, I wrote these articles not as an academic scholar or as a judge but as a lawyer who had represented a client in these cases. In that setting, the fact that I accepted a request (I did not volunteer) to defend the Court's decisions in *City of Boerne*, *Kimel*, and *Morrison* -- all cases in which I represented a client -- should not seem surprising. I of course could not have disagreed publicly with those decisions, because doing so would have been detrimental to my clients. It also bears noting that my primary agreement with these decisions, as explained in the articles, turned on principles with which no sitting Justice has yet disagreed -- namely, that the Court has the final say over what the Constitution means in section 5 cases and that the Court has a role to play in interpreting the meaning of interstate commerce in Commerce Clause cases. I agreed with these principles then and, like the Supreme Court, I agree with them now. But these principles by no means indicate that I favor state power over federal power. And they do not indicate how I would decide future cases if confirmed as a lower court judge.

10. At your hearing, I asked you some questions about Judge Noonan's book, which discusses the concepts of sovereignty and sovereign immunity, and explores how these concepts have become the current Court's way of restricting the powers of Congress and expanding the areas in which states can escape the effective control of Congress. In conclusion, Judge Noonan writes:

> Twenty times in the constitution as amended, the states appear. Sometimes they are given powers, sometimes they are subjected to prohibitions. . . . The tenth amendment reserves powers to them as well as to the people. Nowhere in the entire document are the states identified as sovereigns.
> The claim that the sovereignty of the states is constitutional rests on an audacious addition to the eleventh amendment, a pretense that it incorporates the idea of state sovereignty. Neither the text nor the legislative history of the amendment supports this claim, nor does an appeal to the history contemporaneous with the amendment. A rhetorical advantage is gained by the current court referring to state sovereignty as "an eleventh amendment" matter. The constitutional connection is imaginary.

At your hearing, you admit that "the doctrine that the king can do no wrong is a bad doctrine." (Transcript at p. 252). In your view, not that of being an advocate for your clients, what do you think are the justifications for the expanded doctrine of sovereign immunity? What is the basis on which this rule can be defended?

In your view, where in the Constitution do you find the concept of "sovereign immunity"? Where in the Constitution does it say that citizens of a State cannot sue their own State for violations of law absent consent of the State or Congress' explicit abrogation of state immunity, a principle you seemed to agree with at your hearing? (Transcript at p.211). Doesn't the Eleventh Amendment merely impose a "textual limitation on the diversity jurisdiction of the federal courts" as Justice Stevens wrote in his dissent in Kimel v. Florida Board of Regents, 120 S.Ct. 631, 653 (2000)(*Stevens dissenting*)?

As an advocate, I have not been asked to defend *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), or the Tenth and Eleventh Amendment precedents upon which it relies. The issue was not joined in *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), or for that matter in *City of Boerne v. Flores*, 521 U.S. 507, 517 (1997). While the Constitution does not specifically refer to a sovereign immunity for States, it also does not refer to such an immunity for the National Government. It thus has fallen to the Supreme Court to determine what constitutional immunity there is, when it exists and to which sovereigns it applies.

In a series of century-old cases, the Supreme Court has held that the states enjoy sovereign immunity from lawsuits for money damages. *See Hans v. Louisiana*, 134 U.S. 1 (1890). These cases remain the law of the land, and if confirmed I would be obliged to follow them until such time as the Supreme Court chooses to overrule them.

11. In response to my question about your role in arguing for limits on Congress' power to protect civil rights, you mentioned Justice Brennan's theory, articulated in 1977 in an article called "State Constitutions and the Protection of Individual Rights," that encouraged state constitutions to protect individual rights beyond the minimum by the federal constitution, a concept you referred to as "new federalism." Recently, however, the term "new federalism" has also been used to refer to the trend of increasing the power of states by challenging the authority of Congress to enact laws that impose obligations on the states. What is your view of this version of "federalism," used to describe championing the states at the expense of the national government? Do you think that this federalism also results in increased "dis-uniformity" of the law and a new latitude for result-oriented judicial decision making?

The debates in the Supreme Court about federalism over the course of 200 years show that this is a difficult issue. Throughout, however, the Supreme Court has said that the federal government does not have unlimited power. *See, e.g., City of Boerne v. Flores*, 521 U.S. 507, 516 (1997) (citing *M'Culloch v. Maryland*, 4 Wheat. 316, 405 (1819); *Marbury v. Madison*, 1 Cranch 137, 176 (1803)); *see also The Federalist No. 29*, at 180-81 (C. Rossiter ed. 1961) ("Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government."). The system of checks and balances underlying our system of government sometimes leads to inefficiencies at every level, whether between the federal government and the states or among the branches of the federal government itself. *See, e.g., Bowsher v. Synar*, 478 U.S. 714, 722 (1986) ("That this system of division and separation of powers produces conflicts, confusion, and discordance at times is inherent, but it was deliberately so structured to assure full, vigorous, and open debate on the great issues affecting the people and to provide avenues for the operation of checks on the exercise of governmental power."). Federalism should not, however, lead to results-oriented judging. I would follow binding Supreme Court precedent and apply it even-handedly in every case.

12. I asked you about the Judge Noonan's interpretation of the Supreme Court's revised standard (in 1997) for reviewing Congress' authority to act under Section 5 of the Fourteenth Amendment, which requires that a court review of the legislative record to determine whether Congress identified a constitutional violation or wrong and whether there is proportionality and congruence between the injury to be remedied and the means adopted by the legislature. At your hearing, you admitted that, "It doesn't seem fair to suddenly judge these laws based on a standard that was developed after the law. I think your right to be skeptical of that." (Transcript at p. 255). Do you think it is wrong to apply the new standard to laws enacted prior to 1997, such as the ADA or the Violence Against Women Act? Please explain your position.

As I indicated at the hearing, I sympathize with legislators whose legislation is invalidated based on standards that may not have been apparent at the time the law was passed. The problem in this area is that courts generally treat an interpretation of the Constitution as indicating what the document has always meant, and courts accordingly have hesitated to apply constitutional rulings only on a prospective basis. This rule -- generally declining to announce constitutional decisions solely on a prospective basis -- has been applied in a broad set of contexts. It has not just been applied in federalism decisions but in many civil rights cases where new civil liberties were recognized long after the legislature had enacted laws in the area. As a court of appeals judge, I would follow binding Supreme Court precedent on this issue.

Sixth Circuit

13. As you know, there has been a great deal of press about bitter disputes among the judges on the closely divided Sixth Circuit. It appears that some of your articles, such as the one titled "Supreme Court Highlights" in the Federalist Paper in 1994, defend the harsh tone in Justice Scalia's opinion and discount the notion of having a more conciliatory tone. Such an approach to disagreements among colleagues on the bench would seem to be counterproductive and would only serve to divide further that already divided bench. What assurances can you give the Committee that you will not approach the process of reaching decisions in appellate cases as you have some of the scholarly topics you have written about with a harsh tone?

I believe that it is essential that judges show civility to litigants and to fellow members of the bench. Respect for one's colleagues and fellow members of the Bar requires no less. Collegiality also is essential for maintaining a well-functioning court. Nothing in my writings was intended to suggest otherwise.

Precedent

14. President Bush previously appointed a judge to the Sixth Circuit (John Rogers) who asserted that a lower court, when faced with case law it thinks a higher court would overturn were it to consider the case, should take that responsibility upon itself and go ahead and reverse the precedent of the higher court on its own. As I read it, the idea is that the Supreme Court, for instance, has rules it follows about when and whether to overturn precedent, and lower courts should follow this body of law in the same way they follow other laws of the higher court, and, therefore, a judge should reverse higher court precedent on his own when he thinks that the higher court would. Do you subscribe to this theory that lower courts should intuit when a higher court would decide to overturn its own precedent?

The Supreme Court alone enjoys the prerogative of overruling its own decisions. *Agostini v. Felton*, 521 U.S. 203 (1997). Lower courts must adhere to Supreme Court precedent until that precedent is overruled.

Cases of First Impression

15. As a federal court of appeals judge, you will be called upon to not only interpret case law as it applies to the cases before you, but also to rule on issues that are of first impression for your circuit. How do you approach cases of first impression?

I would approach cases of first impression by keeping an open mind within the bounds of existing precedent. I would review the parties' briefs thoroughly and review the cases that may shed light on the issue. In particular, I would look to the decision of other circuits that may have addressed the issue, and would examine analogous caselaw from related areas of law. I also would discuss the issues presented by the case with law clerks, discuss the case with my colleagues, and go to argument prepared both to ask questions and to listen to the answers provided.

Other

16. In response to Senator Kennedy, you said at your hearing that the cases you have worked on "have covered the spectrum of issues of really almost every social issue of the day, and I have had the opportunity to be on opposite sides of almost every one of those issues" (Transcript pp.77-78).

In what case (or cases) did you argue on behalf of state employees seeking remedies for discrimination?

In what case (or cases) did you argue in favor of or on behalf of women's rights?

In what case (or cases) did you argue in favor of or on behalf of low-income mothers or children in need of health care?

Have you argued any cases before the U.S. Supreme Court involving any of the following social issues, such as the right to privacy, reproductive rights, the constitutionality of the death penalty, immigration, or takings?

Is it more than a coincidence that many of the cases you ended up with before the Supreme Court involved the narrow issues related to sovereign immunity, Congress' authority to act under Section 5 of the Fourteenth Amendment and the Commerce Clause, and federal preemption?

In the *Case Western* case, I argued in favor of an individual who had been discriminated against, but she was not a state employee. Thus far, I have not been asked to argue a Section 5 case on behalf of the Federal Government or a private individual -- though I would certainly be willing to do so. (Of course, while working for the State of Ohio for three and a half years, that option would not have arisen.)

I have not argued a case that specifically addressed women's rights.

I have argued a case involving a law designed to benefit low-income mothers and fathers (and their children). In *Gatton v. Goff*, which I argued when I was Ohio's State Solicitor, the issue was whether an Ohio education funding program (designed for low-income families) was constitutional.

I have not argued a case in the United States Supreme Court involving any of the other issues you mention.

It frequently happens that lawyers develop a reputation for expertise in a given area -- for me, owing to my experience working for the State of Ohio, it was section 5 of the Fourteenth Amendment. As a result, many of my Supreme Court oral arguments occurred in this area, but not all of them. *General Motors v. Tracy*, 519 U.S. 278 (1997), involved a challenge to Ohio's natural gas tax under the dormant commerce clause. While *City of Boerne v. Flores*, 521 U.S. 507 (1997), was a Section 5 case, *Hohn v. United States*, 524 U.S. 236 (1998), was not. There, I was appointed *sua sponte* to argue an appealability issue arising under the Antiterrorism and Effective Death Penalty Act of 1996. *West Covina v. Perkins*, 525 U.S. 234 (1999) was a criminal due process case. *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000), and *Garrett v. Alabama Bd. of Regents*, 531 U.S. 356 (2001), were Section 5 cases, but *Alexander v. Sandoval*, 532 U.S. 275 (2001) posed the statutory question whether Title VI created a private right of action to enforce disparate-impact regulations. In *Becker v. Montgomery*, 531 U.S. 1123 (2001), I represented a civil- rights claimant on a pro bono basis in a dispute over the proper filing of a notice of appeal. I again argued against states in a free-speech and preemption case in *Lorillard v. Reilly*, 531 U.S. 1068 (2001). *United States v. Craft*, 535 U.S. 274 (2002) involved a challenge to a federal tax lien. I argued in support of upholding local transportation safety laws against a federal preemption challenge in *City of Columbus v. Ours Garage and Wrecker Service*, 536 U.S. 424 (2002). Finally, *Holland v. Bellaire Corp.* (2003), turned on a statutory question involving the Coal Act.

17. Former White House Counsel C. Boyden Gray has testified before the Senate Judiciary Committee on the idea of judicial activism, stating "I suggest that history provides us with a working definition of judicial activism. Whenever the judiciary exceeds the role set forth by the Framers, it has exceeded its constitutional role and has become activist. Modern courts have far exceeded their limited role set forth by the Framers and the Constitution." Do you agree with this philosophy, why or why not? Mr. Gray also stated that numerous Supreme Court decisions within the past few decades constitute "activism. It is unconstitutional. If we truly value self-government, we must force the judiciary to return to the limited role envisioned by the Framers and set forth by the Constitution." Do you agree with this philosophical approach, why or why not?

While I am generally uncomfortable with labels like "judicial activism," I agree that the Constitution contains limits on the authority of each branch of government and promotes the principle of separation of powers. Accordingly, courts (like all branches of government) should strive to ensure that they are acting within the constitutional and statutory limits on their power.

1. I would like to ask you about the Violence Against Women Act and the backdrop to that law. You filed a brief in the Supreme Court on behalf of the State of Alabama, arguing against the constitutionality of the federal civil remedy for victims of sexual assault and violence. Among other things, your brief in the Morrison case stated that gender-based violence does not substantially affect interstate commerce.

Prior to the passage of the Violence Against Women Act, Congress held nine hearings and received testimony from over a hundred witnesses. At the end of that long and thorough exploration, Congress concluded that gender-based crimes and fear of these crimes had a substantial impact on interstate commerce.

In the Garrett case, which addressed the constitutionality of the Americans with Disabilities Act, you responded to a question from a Supreme Court justice regarding the function of Congressional findings: "they're exceedingly relevant, and they certainly sustain the ADA as a matter of Commerce Clause legislation, but just as with *Kimel* and the age laws they refer only to discrimination in general. They don't establish constitutional violations."

How do you differentiate between the Congressional findings in the Garrett case which you contend created an acceptable interstate commerce nexus and the findings generated in connection with the Violence Against Women Act? What hearings and evidence would have been sufficient to authorize the Violence Against Women Act under the Commerce Clause? What Congressional findings would have been enough?

***Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356 (2001), like *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), and *Equal Employment Opportunity Commission v. Wyoming*, 460 U.S. 226 (1983), involved a law directly regulating employment. Because the Court has indicated that the regulation of employment directly concerns an economic activity, the Court allows the national regulation of this area so long as its aggregate impact has a substantial effect on interstate commerce. *See United States v. Morrison*, 529 U.S. 598, 610 (2000); *United States v. Lopez*, 514 U.S. 549, 560 (1995). On the other hand, the civil remedy of the Violence Against Women Act (VAWA), which was at issue in *Morrison*, did not directly regulate any employment relationship. While the congressional findings in *Morrison* were relevant in determining whether this one provision of VAWA substantially affected interstate commerce, the Supreme Court ultimately concluded that this connection had not been established.**

As a general matter, Congress is the branch of the Federal Government that is best equipped to gather evidence about effects on interstate commerce and to make these kinds of findings -- which is why the Supreme Court gives Commerce Clause legislation a substantial presumption of constitutionality. *See, e.g., Lopez*, 514 U.S. at 563. It is difficult to say in the abstract what amount of evidence, what number of hearings, or what types of findings would have sufficed to sustain the provision struck by the Court in *Morrison*. As intimated by the Court, it is possible that the provision would have survived review if it had contained "a jurisdictional

element" affirmatively limiting its application to cases with an adequate interstate nexus. *See Morrison*, 529 U.S. at 612; *Lopez*, 514 U.S. at 561-62.

2. Prior to the passage of the Violence Against Women Act, 21 state task force reports scrupulously documented systemic state barriers to women when trying to bring criminal and civil cases against their assailants. What weight should Congress have given to these state reports? What weight should a court reviewing the constitutionality of the Act have given to these reports? Do you attach any significance to the fact that 41 state attorneys general (from 38 states, the District of Columbia, and two United States territories) urged Congress to enact the Violence Against Women Act?

In considering whether to enact legislation, it is appropriate for Congress to take into account all evidence reasonably available, including state reports relevant to the item under consideration. In the case of laws enacted under Section 5 of the Fourteenth Amendment, the above state reports could be relevant in determining whether the states had a history of violating the constitutional rights of their citizens. *See City of Boerne v. Flores*, 521 U.S. 507 (1997). From the perspective of a reviewing court, these kinds of reports could establish or rebut a conclusion that the states had a history of violating the constitutional rights of their citizens. According to the Supreme Court, the main difficulty in *United States v. Morrison*, 529 U.S. 598 (2000), was not whether such a history of constitutional violations existed. Rather, the issue for the Court was whether VAWA responded to the problem by regulating state action. *Id.* at 626.

As a practical matter, it is significant that a large number of state attorneys general supported the federal government in *Morrison*. In fact, this may show that the states are sensitive to the problem of violence against women. But the Court has concluded that such popular support for a law is not dispositive in determining its constitutionality. *See City of Boerne v. Flores*, 521 U.S. 507 (1997) (rejecting bipartisan Congressional efforts to protect religious liberties); *United States v. Lopez*, 514 U.S. 549 (1995) (finding unconstitutional Congressional regulation of guns in the vicinity of schools).

3. Do you still believe that the constitutional defense of VAWA and other similar statutes "would give any congressional staffer with a laptop the ultimate *Marbury* power – to have a final say over what amounts to interstate commerce and thus to what represents the limits on Congress's Commerce Clause powers?" Why?

The Supreme Court has held that, in light of its ultimate *Marbury* authority to say what the law is, the Court has a role in reviewing even the most extensive findings of fact. *See Morrison*, 529 U.S. at 614 ("'[w]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court'" (quoting *Lopez*, 514 U.S. at 557 n.2 (internal quotation marks omitted)) (brackets in *Morrison*)); *City of Boerne v. Flores*; 521 U.S. 507, 536 (1997) ("Congress' discretion is not unlimited, however,

and the courts retain the power, as they have since *Marbury v. Madison*, to determine if Congress has exceeded its authority under the Constitution."). I continue to believe that this principle, as difficult as it may be to apply in some settings, is firmly established in the Supreme Court's cases -- and I would follow it as a court of appeals judge. Even the four dissenters in *Morrison*, it bears adding, embraced this principle, though not its application in that case. *See Morrison*, 529 U.S. at 628 (Souter, J., dissenting).

4. Your criticism of "unexamined deference" to Congressional findings suggests that when determining interstate commerce effects, courts must take a long, hard look at Congressional findings and evaluate them. What specific criteria should courts apply to Congressional findings? How should these criteria be applied?

While the Supreme Court has rejected wholly unexamined deference to congressional fact findings, it has emphasized the great degree of deference that courts should afford such findings as well as Congress's superior fact-finding capacity. *See, e.g.*, *City of Boerne*, 521 U.S. at 535-36. Such findings properly enable courts "to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye." *Lopez*, 514 U.S. at 563. The Court in *Morrison* merely cautioned that the strength of such findings is weakened where they employ "a method of reasoning that [the Supreme Court] ha[s] already rejected as unworkable." 529 U.S. at 614. Through it all, however, the Court has made clear that federal laws deserve a heavy presumption of constitutionality and congressional findings deserve a great deal of respect.

5. Do you believe that Congress, through its Commerce Clause powers, may criminalize the killing of endangered species, even if the animals in question never cross state lines? Why?

According to existing Supreme Court precedent, Congress may criminalize the killing of animals of an endangered species, even if the animals in question never cross State lines. To do so, Congress would only need to show that the regulated activity substantially affects interstate commerce. *See Morrison*, 529 U.S. at 610; *Lopez*, 514 U.S. at 560-61. Several appellate courts have upheld the Endangered Species Act as a valid exercise of Congress's Commerce Clause powers. *See, e.g., Gibbs v. Babbitt*, 214 F.3d 483, 492 (4th Cir. 2000).

6. May Congress, through its Commerce Clause powers, criminalize wholly intrastate activity, such as drug use? Let's say that Bob grows marijuana in his backyard, somewhere in Delaware, and then walks over to the house of his neighbor Jim and sells some marijuana to him so Jim can get high while sitting around watching TV. No direct interstate commerce connection at all. Can the drug laws permissibly reach such activity?

Under Supreme Court precedent, the commerce power extends to (1) regulations of the use of the channels of interstate commerce, (2) laws protecting and regulating the instrumentalities of interstate commerce, and (3) laws regulating activities having a substantial effect upon interstate commerce. *See Lopez*, 514 U.S. at 558-59. With regard to the third category, so long as the regulated activity has a substantial effect on interstate commerce, it can be regulated even if it occurs wholly within a single State. *See id.* at 559-60; *see also Wickard v. Filburn*, 317 U.S. 111 (1942).

7. You have been quoted as saying "It doesn't get me invited to cocktail parties. But I love these issues. I believe in this federalism stuff." Did you say that? How does your statement that you "believe in this stuff" comport with your statements that you were merely acting as an advocate, you would have litigated either side of this issue, and you did not care which one you were on?

The quotation is from a *Legal Times* article written many years ago -- while I was the State Solicitor of Ohio. I assume that the quotation is accurate. I do believe in the general principle of federalism. It is one of many separation-of-powers principles that describes the allocation of power in our government. It also bears noting that "federalism" covers a variety of state issues -- not just disputes about section 5 of the Fourteenth Amendment or the Commerce Clause. For example, the Supreme Court case that prompted the *Legal Times* article was *City of West Covina v. Perkins*, a due process case involving property seizures.

While serving as State Solicitor, I only had the option of arguing on the state side of all cases involving state authority in the United States Supreme Court. After leaving that office, I did not restrict myself to arguing cases solely on behalf of states. Several of my cases in the Supreme Court over the last four years have not involved state parties or were brought against states. For example, I argued *Becker v. Montgomery* and *Lorillard v. Reilly* -- each against States -- after returning to private practice.

8. Mr. Sutton, I am a little concerned about what I have read regarding your approach to precedents from the Supreme Court. Could you tell me the approach you would take, as an appellate court judge, to Supreme Court decisions that are on point?

The first duty of a federal appellate court judge is to determine whether the decision in a particular case is governed by precedent from the United States Supreme Court or by a prior decision of the same court of appeals. As a court of appeals judge, I would identify the relevant precedents on point, determine the test established by that precedent, then apply that test to the facts of the case.

9. Some observers have criticized your approach to precedent in the Westside Mothers case. In that case, you argued to a District Court (and later an appeals court) that individuals cannot bring suit against state officials to require the provision of important Medicaid benefits guaranteed under federal Medicaid law. Your critics say you first

ignored a Supreme Court decision that was factually similar and directly in opposition to your position, and later advised the court not to be "overly concerned" with the ruling because the Supreme Court had backed away from other aspects of it in subsequent cases. Is this an accurate description of what happened in the case? How do you square your position with the binding nature of a Supreme Court precedent when reviewed by a lower court?

***Westside Mothers* dealt with competing Supreme Court authorities, not a single line of cases. On the one hand, *Maine v. Thiboutot*, 448 U.S. 1 (1980), suggested that federal statutory rights created through Spending Clause legislation could be enforced using § 1983. On the other hand, the Supreme Court held in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981), that "legislation enacted pursuant to the spending power is much in the nature of contract" and requires a clear statement of the duties Congress was imposing on the contracting states. *See also Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989). My role in the case was not to weigh the earlier *Thiboutot* decision against the subsequent holdings of *Pennhurst* and *Will*; my role -- as defined by the District Court's invitation for me to represent the interests of the Michigan Municipal League -- was to present the best argument I could in support of my client. As a result, while we argued that the more recent *Pennhurst* and *Will* authorities should control over the earlier *Thiboutot*, most of the brief analyzed a question of pure contract law previously reserved by the Supreme Court: whether third-party beneficiaries, at the time of section 1983's enactment, could maintain an action to bring a suit to enforce a beneficial interest in a contract.**

I did not appear as counsel during the appeal of the *Westside Mothers* case and I cannot speak to the arguments presented to the Court of Appeals.

10. If the Supreme Court has called into question a portion of an earlier Court decision, do you believe that lower courts should disregard – or minimize – other, unrelated portions of that earlier decision? Please describe how you would approach such a situation as a federal judge.

In *Agostini v. Felton*, 521 U.S. 203 (1997), the Supreme Court held that if its precedents have direct application in a case, yet appear to rest on reasons rejected in some other line of decisions, the lower federal court should follow the case that most directly controls. As *Agostini* makes clear, the Supreme Court alone enjoys the prerogative of overruling its own decisions.

11. In several instances in your testimony you took the position that your personal writings about cases you argued did not represent your personal views on the issue. I understand your point that it would have been inappropriate to take the position that your client's position was wrong, but, as I understand it, you were under no obligation to write under your own name and support your client's position. Silence was also an option as was writing a summary of what the Supreme Court did without expressing your personal views of the correctness of these opinions. But you endorsed

the views you advocated in briefs in your personal writings. Why should these not be treated as your personal writings? Does your position mean that, anytime you write or speak on an issue you have litigated on behalf of a client, your comments should not be considered your personal views? If not, when can your writings and remarks be taken as reflecting your own views?

I did not volunteer to write about the cases I argued. I was asked to do so; while I could have declined, it is appropriate in my view for lawyers to share ideas about the law -- including in this instance to discuss a case I argued. Not only is it within the prerogative of a lawyer to say that the Court was right in ruling for his or her client, the lawyer has no other choice in commenting on the decision. While these are my personal writings, they do not necessarily reflect the view I would take of a case or an issue as a judge. That very-different process requires studying the briefs, hearing the arguments, and weighing competing views with care and objectivity.

Senator Edward M. Kennedy's

Follow-Up Questions for Jeffrey Sutton

Westside Mothers

1. You were involved in a case called Westside Mothers in which poor children and their mothers challenged Michigan's failure to provide them adequate dental services as required under Medicaid. They were not after money damages in this case, they just wanted the State of Michigan to provide them the benefits required by federal law. They brought suit under section 1983, which the Supreme Court has held allows you to bring claims to address violations of federal statutes. You argued that they could not enforce the Medicaid Act using section 1983. Your argument would have limited the enforcement of a range of spending power statutes and, to my reading, sought to reverse more than 25 years of Supreme Court precedent. You prevailed at the district court level, but the Sixth Circuit reversed, rejecting your broad theories.

   In your testimony (TR 84), you stated that your briefs did not advocate all the positions that Judge Cleland, the district court judge, eventually adopted. Even accepting that Judge Cleland went further than your brief, you made many of the far-reaching arguments that Judge Cleland accepted. You argued, and Judge Cleland accepted: (1) that Spending Clause legislation creates merely a contract between a State and the federal government (Br. at 2, 3-5); (2) that section 1983 cannot be used to enforce the Medicaid Act, and can never be used to enforce federal mandates imposed under the Spending Clause (Br. 5-18).

   Your key arguments were not accepted by the Sixth Circuit. See, e.g., 289 F.3d 852, 858 (2002) (" Contrary to this narrow characterization, the Court in Pennhurst I makes clear that it is using the term 'contract' metaphorically, to illuminate certain aspects of the relationship formed between a state and the federal government."); see also id. at 861 (holding that there is a private right of action under section 1983).

   Your argument that federal rights created under the Spending Clause could not be enforced under § 1983, seems to be flatly inconsistent with the Supreme Court's decision in Maine v. Thiboutot, 448 U.S. 1 (1980). Thiboutot, which made clear that federal statutory rights could be enforced through section 1983 actions, involved rights established under the Social Security Act, a Spending Clause statute. You never discuss this binding Supreme Court ruling in your opening brief. (Indeed, you briefly cite only language from the dissent in that case.)

   Were you aware of the fact that Thiboutot and several of its progeny, were Spending Clause cases when you filed your initial brief in Westside Mothers?

   If so, why did you not bring this fact to the Court's attention in your opening brief?

In *Westside Mothers*, the district court was faced with a legal question that implicated two competing lines of Supreme Court precedent. One of those lines of cases included *Maine v. Thiboutot* and several other cases. Another line of cases from the

Supreme Court held that "legislation enacted pursuant to the spending power is much in the nature of contract" and requires a clear statement of any state responsibilities undertaken in return for federal funds. *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981). To the extent the district court viewed the Spending Clause legislation as a contract between the Federal Government and the States, the court needed to determine whether section 1983 provided for a private right of action for third-party beneficiaries of that contract -- a question reserved by the Supreme Court in *Blessing v. Freestone*. Most of the Michigan Municipal League's brief thus was dedicated to analyzing a question of pure contract law: whether third-party beneficiaries, at the time of section 1983's enactment, could maintain an action to bring a suit to enforce a beneficial interest in a contract—an issue that was neither raised nor briefed in *Thiboutot*.

In filing the opening and reply *amicus* briefs in this case, we were aware of *Thiboutot* and other cases in which spending clause statutes had been enforced through section 1983. And in both briefs, we addressed the issue. In our opening brief, we said the following: "*Finally*, plaintiffs contend that any argument that Spending Clause legislation cannot be enforced by private litigation under section 1983 is foreclosed by Supreme Court and Sixth Circuit precedent. Neither court considered or rejected the arguments raised here, however. Accordingly, under firmly settled Supreme Court doctrine, the questions presented in this case remain unresolved." We then cited several Supreme Court decisions making this point as well as a concurrence in *Blessing v. Freestone* specifically reserving this question. In our reply brief, we then responded again to the issue by discussing *Thiboutot* extensively.

As an *amicus curiae* invited to participate by the district court, it bears adding that the Michigan Municipal League was not one of the two opposing parties in the litigation. Nonetheless, my client did discuss generally the relevance of other Supreme Court authority in the opening brief and extensively responded to the reliance on *Thiboutot* in the reply brief.

2. In your reply brief in Westside Mothers, you concede that "Thiboutot itself, as well as several of its progeny, arose in the context of Spending Clause legislation." You then argue that because the Court in Thiboutot and subsequent cases had "assumed but not squarely decided" the enforceability of Spending Clause mandates under § 1983, the question was an open one. You advised Judge Cleland that he should not "be overly concerned whether its decision can be reconciled with the facts - as opposed to the rationale - of Thiboutot and its progeny."

   A. Please explain why you thought the Court should not be overly concerned with Thiboutot or its progeny.

   B. Do you believe a lower court judge is free to ignore (or not be "overly concerned" with) a Supreme Court ruling that is factually indistinguishable from the case before the lower court even if the Supreme Court has backed away from other portions of the precedent in question?

A) *Westside Mothers* presented the district court with what it described as "complex" legal questions concerning competing lines of Supreme Court precedent and a difficult historical issue of statutory interpretation. As noted, *Thiboutot* and its progeny seemed to conflict with *Pennhurst*, *South Dakota v. Dole*, and *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989). In contrast to Thiboutot, Pennhurst concluded that "Congress must express clearly its intent to impose conditions on the grant of federal funds so that the States can knowingly decide whether or not to accept those funds." *Id.* at 24. In the face of these competing lines of decisions, the district court invited *amicus curiae* to provide additional briefing on these issues. The obligation of the court was either to reconcile the precedents or to determine which one was controlling. As an advocate for a client, it was reasonable to argue that the later *Pennhurst* line of cases was controlling.

B) In *Agostini v. Felton*, 521 U.S. 203 (1997), the Supreme Court held that when Supreme Court precedent has direct application in a case, lower federal courts should follow it. As a court of appeals judge, I would adhere to that precedent.

3. Judge Cleland raised the question of whether plaintiffs could bring suit under the Spending Clause sua sponte. Michigan did not raise the question. Judge Cleland asked the parties to brief the question, then dissatisfied with Michigan's answer, he invited your participation as amicus. Your client in the case was a group called the Michigan Municipal League.

Please answer the following questions:

A. Did you contact the judge to get involved in the case or did the judge contact you?

B. Do you know why the judge thought to contact you to brief the question? Did you know him personally?

C. In your testimony you said that a call from a judge is "not a call you choose not to return" (Tr. 83). Did you feel compelled to participate in the case? Once you decided to participate in the case, did you feel free to make any argument on behalf of your client? Who were you representing in the case? Who is the Michigan Municipal League (MML)?In your testimony you stated that the "Michigan Municipal League ultimately asked me to write the brief, so there was a client in the case" (Tr. 83). Did the MML contact you to be involved in the case, or did you contact them? Did the Michigan Municipal League determine the arguments to be made in this case, or did you? What was your client's interest in this case? In other words, why would towns and cities not want poor individuals to be covered under Medicaid when the burden of uncompensated care might fall to them?

D. Who were you representing in the case? Who is the Michigan Municipal League (MML)?

E. In your testimony, you stated that the "Michigan Municipal League ultimately asked me to write the brief, so there was a client in the case" (tr. 83). Did the MML contact you to be involved in the case, or did you contact them?

F. Did the Michigan Municipal League determine the arguments to be made in this case, or did you?

G. What was your client's interest in this case? In other words, why would towns and cities not want poor individuals to be covered under Medicaid when the burden of uncompensated care might fall to them?

A) The district court contacted me and invited my participation.

B) The district court did not explain its reasons for contacting me. I had not met Judge Cleland before his clerk contacted me, and I first met the judge at the hearing in the case.

C) I felt honored to be asked to participate in the case by the district court, a feeling I think most practicing lawyers would have in this instance. The district court asked the Michigan Municipal League to brief issues that had not been fully explored by the previous briefs, and we followed the district court's instructions in preparing our brief.

D) We represented the Michigan Municipal League and its Defense Fund. The Michigan Municipal League is the Michigan association of cities and villages. The League is a nonpartisan organization working through cooperative effort to strengthen the quality of municipal government and administration.

E) I had never done legal work for the Municipal League before, and I was put in contact with them either by the district court or the State of Michigan.

F) As with all legal work, the brief was filed on behalf of the client, not the lawyers, and the views expressed in the brief were those of the client, not the lawyers. We were providing the best reasonable arguments we could develop that advanced the League's interests and that were responsive to the district court's questions.

G) In filing these *amicus curiae* briefs in the district court, the Municipal League stressed the importance to cities and states of having Congress be explicit when it conditions the receipt of federal funds upon accepting specific obligations or waiving any immunity to suit.

4. Do you personally agree with the view taken by MML in Westside Mothers regarding (a) whether spending power statutes are just a contract and (b) whether spending power legislation is enforceable using Section 1983?

During the *Westside Mothers* case, I did not have the occasion to think about the issues as a judge would think about them—i.e., to determine which of the parties had the better legal argument. Rather, my job was to make the best arguments I could on behalf of

my client. As a court of appeals judge, I would be required to follow controlling precedent from the Supreme Court as well as precedent from the Sixth Circuit. The Sixth Circuit has decided the *Westside Mothers* case, and I would be obligated to—and would—adhere to that decision and precedent as a court of appeals judge. Having never been through the deliberative exercise of being asked to rule on the case, I do not know what I would have done if I had been asked to decide (rather than just argue) the case.

Sandoval

5. You represented the State of Alabama in Alexander v. Sandoval, 532 U.S. 275 (2001), in which the Supreme Court held 5-4 that there was no private right of action to enforce disparate impact regulations promulgated under Title VI of the Civil Rights Act of 1964. The Sandoval decision reversed an understanding of the law that had been in place for more than 27 years, and makes it nearly impossible to enforce a range of practices with an unjustified racially disparate impact. Additionally, as Title IX is modeled on Title VI, Sandoval has been interpreted to limit private enforcement of regulations promulgated under Title IX, such as regulations forbidding retaliation against those who file Title IX complaints.

   In oral argument, you lead with a more sweeping argument than whether there was an implied right of action under the Title VI regulations, you argued that there should be no implied right of action under spending power statutes. See 2001 WL 55359, *3 ("The first [argument] is that it is never appropriate for a branch of the Federal Government to imply the creation of a private right of action under the spending power."). The Supreme Court did not accept this argument.

   A. Please explain why you made this argument and why you decided to lead with this argument given that a much narrower issue was before the Court.

   B. Your argument seems to contradict the Supreme Court's decision in Cannon v. University of Chicago, 441 U.S. 677 (1979), which found that individuals have an implied private right of action to enforce Title IX, which is spending power legislation. You received the following question from a Justice of the Supreme Court: "I wanted to know how sweeping your position is, and you are saying that if Cannon had been against the University of Illinois instead of the Medical School of the University of Chicago, it would have been thrown out?" You answered yes. Please explain your position that Cannon was limited to private institutions.

   C. Please explain the textual and historical basis for your argument, and any precedent that supports your position.

A) I appeared in the *Sandoval* case as an advocate on behalf of the State of Alabama. In that role, I considered it my professional duty to present all reasonable arguments, within the bounds of precedent, that advanced Alabama's interests in the case. In advancing their client's interests, advocates frequently make a range of arguments that

vary in strength, sometimes placing the stronger arguments first, sometimes placing them later in the argument.

B) As your question suggests, *Cannon v. University of Chicago*, 441 U.S. 677 (1979), involved an implied cause of action against a private defendant. Over time, the Supreme Court, in considering potential implied causes of actions against states, has applied separate criteria and factors that were not at issue in *Cannon* and were not raised in that case. As we explained in our opening brief in *Sandoval*, *Cannon* did not apply a clear-statement rule and did not involve a disparate-impact claim brought under an administrative regulation. Cases decided after *Cannon* have stressed the importance of these and other factors in considering whether an implied cause of action exists against states. As explained in our briefs, those factors include the necessary showing for establishing a waiver of constitutional rights by the states, *see College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999) ("courts indulge every reasonable presumption against waiver of fundamental constitutional rights"), and the need for a clear statement when Congress imposes an obligation on a state, *see South Dakota v. Dole*, 483 U.S. 203, 207, 210 (1987) (when Congress "desires to condition" funding on a State's consent to federal authority beyond Congress's traditional limits, "it must do so unambiguously").

The Supreme Court faced two additional issues in applying *Cannon* and other precedent in deciding *Sandoval*. First, *Cannon* involved a claim arising directly from the intentional-discrimination mandate of Title IX. *Cannon* thus was a discriminatory-intent case, while *Sandoval* was a discriminatory-impact case. Second, *Cannon* did not address when a private right of action exists under administrative regulations, as it did not enforce a regulatory right, but a statutory one. *Sandoval*, on the other hand, questioned whether Congress authorized individuals to bring private rights of action against States under disparate-impact regulations issued by a federal agency.

C) The precedents discussed in the above response are the basis for the arguments that Alabama made.

6. Do you believe that Title IX and Title VI are privately enforceable against States? Why or why not? Do you believe that this question was already decided by the Supreme Court? What do you believe is the effect of Congress' post-Cannon abrogation of State's sovereign immunity under Title IX and Title VI?

Unlike the regulations at issue in *Sandoval*, the Congress expressly created private rights of action for Titles VI and IX in the Rehabilitation Act Amendments of 1986, 42 U.S.C. § 2000d-7. *See, e.g., Franklin v. Gwinnett County Public Schs.*, 503 U.S. 60, 72 (1992). As Alabama argued in the briefing in *Sandoval*, this distinction suggests that Congress appreciates that the States are not traditional civil defendants and, before they may be sued in the Spending Clause context, the private right of action must be expressly identified.

7. By my reading, you also challenged the validity of the disparate impact regulations. In your testimony. You argued that Section 601 "does not authorize federal agencies to

create rules barring disparate effects arising from generally-applicable state programs that occur 'merely in spite of,' rather than 'because of' an individual's national origin." See 1999 U.S. Briefs 1908, *24-26 ("An effort to bar disparate effects arising from such generally-applicable regulations would not 'effectuate' the objections of Title VI, but would rewrite them."). The Supreme Court decided not to take up this argument, which would have made it impossible for even the federal government to enforce acts with unjustified racially disparate impacts. In your testimony however, you stated that "even though we could have challenged the [regulations], gone that extra step, we did not challenge them." (Tr. 404)

A. Please explain how you reconciled your arguments about an agency's power to issue disparate impact regulations under Title VI with Alexander v. Choate, 469 U.S. 287, 293-94 (1985) and Guardians Ass'n. v. Civil Serv. Comm'n of New York City, 463 U.S. 582, 584 (1983).

B. Please explain why the arguments in the brief are not a challenge to the disparate impact regulations.

A) Briefly stated, *Alexander v. Choate*, 469 U.S. 287, 293-94 (1985), and *Guardians Ass'n v. Civil Serv. Comm'n of New York City*, 463 U.S. 582, 584 (1983), supported Alabama's arguments in *Sandoval* in two different ways. First, both *Alexander* and *Guardians* rejected implied private causes of action. That result by itself bolstered, rather than weakened, Alabama's argument that no implied private cause of action existed under the regulations at issue in *Sandoval*. Second, Alabama argued that *Guardians* and *Alexander* confirm that an agency may issue disparate impact regulations whenever the authorizing statute allows it. Because "[s]even Members of the Court agree[d] that a violation of [Title VI] requires proof of discriminatory intent," *Guardians*, 463 U.S. at 608 n.1, Alabama argued that it would seem that an agency could not administratively remove a requirement that Congress wrote into the statute. And Alabama showed that *Alexander* was entirely consistent with this position. Indeed, because Congress in the Rehabilitation Act intended to reach "action that discriminated by effect as well as by design," Alabama acknowledged that it was proper for the Court to "resist[] "too facile an assimilation of Title VI law into" those other laws.

B) *Sandoval* questioned whether Congress authorized a private right of action against the State under disparate-impact regulations promulgated by federal agencies. The case did not present a challenge to the validity of the disparate-impact regulations, and the reply brief specifically said that the Court did not need to reach the issue. *See Alexander v. Sandoval*, 532 U.S. 275, 279 (2001) ("We do not inquire here whether the DOJ regulation was authorized by § 602 . . . . The petition for writ of certiorari raised, and we agreed to review, only the question posed in the first paragraph of this opinion: whether there is a private cause of action to enforce the regulation.").

8. In your brief, you argued that "every law has a disparate impact on someone" and that "an across-the board efforts to regulate disproportionate impacts where federal dollars appear would "be far-reaching and would raise serious questions about, and perhaps

invalidate, a whole range of tax, welfare, public service and licensing statutes. Washington v. Davis, 426 U.S. 229 (1976)." 1999 U.S. Briefs 1908, *39.

In fact, the standard is not that any disparate impact is actionable, only a discriminatory impact that is substantial and that is not justified by business or agency necessity. See, e.g., Powell v. Ridge, 189 F.3d 387, 393 (3rd Cir. 1999); New York Urban League, Inc. v. New York, 71 F.3d 1031, 1036 (2d Cir. 1995); City of Chicago v. Lindley, 66 F.3d 819, 828-29 & n.12 (7th Cir. 1995); Elston v. Talladega County Bd. of Educ., 997 F.2d 1394, 1407 (11th Cir. 1993).

A. In light of this, please explain your argument that a "disparate impact" standard under Title VI would be too far-reaching.

B. Do you believe that Congress can use its spending power to reach State practices with an unjustified disparate impact? Please explain.

C. Do you believe that under Title VII of the 1964 Civil Rights Act–as amended by the Civil Rights Act of 1991– Congress had the power to make Title VII's disparate impact applicable to States? Do you believe that this question has been decided by the Supreme Court or that it is an open question after Boerne and Garrett?

D. Do you believe that the Title VI disparate impact regulations were consistent with the agencies' power to promulgate regulations to enforce the anti-discrimination provisions of Title VI?

A) There are two possible answers to this question. One, in *Sandoval*, Alabama did not argue that "a 'disparate impact ' standard under Title VI would be too far-reaching; the state argued only that the statute and regulatory requirement were insufficient to allow a private cause of action to enforce such a standard. (*See, e.g.*, Pet. Br. 39.) Two, the state argued that a privately-enforced disparate impact standard could have unanticipated consequences -- potentially stretching state resources in defending the validity of everything from school-funding requirements to bus and subway fare increases, the relocation of business and government services relocations to student graduation requirements. (*See id.*)

B) Congress may use its spending power to attach conditions on the receipt of federal funds, and I am not aware of any constitutional reason why it could not do so with respect to disparate-impact laws. *See South Dakota v. Dole*, 483 U.S. 203, 206 (1987).

C) The Supreme Court has addressed the application of Title VII to the States in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). I have not considered whether *Fitzpatrick* definitively settles the particular question presented here, but that is where I would begin my analysis if I were presented this same question as a judge.

D) As an advocate for the State of Alabama in *Sandoval*, I was professionally obligated to present all reasonable grounds why the private cause of action asserted by the

plaintiff was inconsistent with the power granted to the agency. The case did not involve the existence of disparate impact regulations under Title VI generally, and I have not had an occasion to consider the question presented here. *Fitzpatrick* and *Sandoval* are both binding precedents on the Courts of Appeal, and if I were a federal appellate judge faced with this issue I would have to decide whether one, both, or neither settled a particular case.

9. In opening your argument in Sandoval, you stated that States "are co-equal sovereigns and, as a result, the Court has not lightly inferred that Congress meant to regulate the States as States, to regulate in core areas of local sovereignty, or, as here, to expose the states to a private right of action." But in Federal Energy Regulatory Commission v. Mississippi, 456 U.S. 742, 761 (1982), the Supreme Court specifically rejects the argument that States are "co-equal sovereigns." While the Court has ruled that States have sovereign immunity, the Court has recognized that this immunity can be abrogated by the Federal Government in certain circumstances, something that could never happen if the Federal Government and the States were "co-equal sovereigns."

   Do you believe the States and the Federal Government are co-equal sovereigns? Why did you choose this phrase in your opening statement in Sandoval?

   Since the decision in *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 761 (1982), the Supreme Court has recognized States as "co-equal sovereigns" both in name, *see Tafflin v. Levitt*, 493 U.S. 455, 466 (1990), and effect, *see Printz v. United States*, 521 U.S. 898, 935 (1997); *New York v. United States*, 505 U.S. 144, 178 (1992). Alabama's argument in *Sandoval* was framed within these authorities. As a federal appellate judge, I would be bound both by *Sandoval / Printz / New York* conception of dual sovereignty and any limitations imposed on that conception by *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 761 (1982).

10. Do you personally agree with the arguments you made in Sandoval including that (a) it is impermissible to imply a private right of action in spending power legislation; and (b) that there is no private right of action to enforce the disparate impact regulations of Title VI.

As a court of appeals judge, I would be required to following controlling precedent from the Supreme Court. The Supreme Court has decided *Sandoval*, and I would be obligated to—and would—adhere to that decision and precedent as a court of appeals judge.

<u>Federalism</u>

11. Do you personally agree with the argument you made in Garrett that Title I of the ADA was not properly enacted under Section 5 of the Fourteenth Amendment?

As a lawyer in *Garrett*, I did not have occasion to determine whether my client's arguments were legally correct. That was the court's function. My function was to muster the best arguments possible on behalf of my client, the State of Alabama. Thus, any

argument I have made as an advocate does not necessarily reflect my own beliefs, but rather reflects what I believe will best advance my client's cause. However, if I am confirmed to be a court of appeals judge, I will be duty-bound to abide by existing Supreme Court precedent.